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**NO LONGER IN SUSPENSE: CLARIFYING THE HUMAN RIGHTS
JURISDICTION OF THE SADC TRIBUNAL**



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NO LONGER IN SUSPENSE: CLARIFYING THE HUMAN RIGHTS JURISDICTION OF THE SADC TRIBUNAL

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1 Introduction

Over the past decades, apart from the creation of the continental body known as the African Union (AU), there has been a proliferation of sub-regional economic communities such as the Economic Community of West African States (ECOWAS), the East African Community (EAC) and the Southern African Development Community (SADC).¹ While Regional Economic Communities (RECs) were created primarily to deal with economic issues it has been persuasively argued that there is a nexus between the objectives of regional integration and the realisation of human rights,² albeit there is contestation of this fact. Each of these sub-regional communities has a tribunal that is established in terms of their respective constituent documents. These tribunals are the Southern African Development Community Tribunal³ (the SADC Tribunal), the Economic Community of West African States Community Court of Justice⁴ (the ECOWAS CCJ), and the East African Court of Justice (EACJ).⁵ The tribunals are instrumental in promoting regional integration on the African continent and are therefore responsible, *inter alia*, for interpreting and

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¹ These were formed under various treaties such as the *Treaty Establishing the East African Community* (1999), which was adopted in 1999 and became operational on 18 July 2010; the *Treaty of the Economic Community of West African States* (1975) (hereinafter referred to as the *Treaty of ECOWAS*); and the *Treaty of the Southern African Development Community* (1999), (*SADC Treaty*). See Viljoen *International Human Rights Law* 488.

² Viljoen *International Human Rights Law* 488, 495-496.

³ Cowell 2013 *HRLR* 153.

⁴ Alter, Helfer and McAllister 2013 *AJIL* 737.

⁵ Mwinuka *Regional Human Rights Systems* 3.

applying treaty provisions in order to resolve disputes arising from economic integration.⁶ Even though the protection of human rights was not originally within their jurisdiction⁷ through express or implied mandates, they have adjudicated over cases involving allegations of the violation of human rights.

Jurisdiction means the power or competence of a tribunal to adjudicate over a legal dispute, and issue a binding judgement.⁸ The tribunals derive such power or competency from a constituent document that defines its power.⁹ Where the instrument is silent about certain powers of the tribunal, the tribunal may decide to resort to an implied mandate in order to adjudicate over a legal issue before it. The tribunal can do so by considering whether the exercise of such power would be necessary to achieve its object and purpose as contained in the constituent document.¹⁰

The primary focus of this discourse is the SADC Tribunal, which is the judicial organ of the SADC. It was established in terms of article 9(g) as read with article 16 of the *SADC Treaty*. The Tribunal's mandate *inter alia* is to ensure adherence to and proper interpretation of the provisions of the SADC Treaty and its subsidiary instruments, and to adjudicate over the disputes that may be referred to it.¹¹ The decisions of the SADC Tribunal are final and binding on the parties to the dispute.¹² The SADC Tribunal did not have the power to compel SADC member states to comply with its decisions. Instead, in cases of non-compliance, it had to determine if there had indeed been a failure on the part of member state to comply with its ruling. If this was so, it had to refer such a case to the Summit for the latter to take appropriate action.¹³ The SADC Tribunal became operational on 22 November 2006. However, the challenges against the legitimacy and the extent of the powers conferred upon

⁶ Viljoen *International Human Rights Law* 503.

⁷ Viljoen *International Human Rights Law* 485.

⁸ Capps, Malcolm and Stratos *Asserting Jurisdiction* xix; Spencer 2006 *U Chi L Rev* 617; Rosenne *Law and Practice* 536. For the purposes of this discourse, the words "jurisdiction" and "power" are used interchangeably and mean the same thing.

⁹ Cheng *General Principles of Law* 259.

¹⁰ Akade 1998 *EJIL* 451.

¹¹ A 2 of the *Protocol on Tribunal in the Southern African Development Community* (2000) (the *SADC Protocol on the Tribunal*) read with a 16(1) of the *SADC Treaty*.

¹² See a 16(5) of the *SADC Treaty*; a 32(3) of the *SADC Protocol on the Tribunal*.

¹³ See a 32(5) of the *SADC Protocol on the Tribunal*.

the SADC Tribunal eventually resulted in its demise. It was consequently suspended in August 2010 by the SADC Heads of States and Government.¹⁴ This action emanated from the SADC Tribunal's decision in the matter of *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe*.¹⁵ In this case the SADC Tribunal, through the exercise of implied powers, ruled that it had powers and competency to adjudicate over a case concerning the allegations of human rights violations.¹⁶ This study investigates whether the attacks on the SADC Tribunal, as an international organisation, were legally warranted and whether the Tribunal acted within its powers when it accepted and adjudicated on a case involving human rights abuses.

For the purposes of a comprehensive analysis of the delimitation of the jurisdiction of international tribunals, this paper is composed of five sections. Section I deals with the powers of international organisations as conferred on them by member states and the exercise of the implied powers that are necessary for the organisation to fulfil its objectives. Section II discusses the implied powers of international organisations under international law with specific reference to the decisions of the International Court of Justice (ICJ) and the International Criminal Tribunal for the former Yugoslavia (ICTY). Section III focuses on the exercise of implied powers to adjudicate over human rights cases by the EACJ and the ECOWAS CCJ. Section IV discusses the exercise of implied powers by the SADC Tribunal in the *Campbell* case and compares it with the decisions of the ECOWAS CCJ, the EACJ and the ICJ. Section V provides a conclusion and recommendations.

¹⁴ De Wet 2013 *ICSID Review* 1. Following its suspension in 2011, the new proposals are that the envisaged SADC Tribunal will deal only with disputes between member states. See SADC Heads of State and Government 2012 http://www.sadc.int/files/3413/4531/9049/Final_32nd_Summit_Communique_as_at_August_18_2012.pdf.

¹⁵ *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe* 2008 SADC T 2 (28 November 2008) (hereinafter referred to as the *Campbell* case).

¹⁶ *Campbell* case 25.

2 Jurisdiction of international organisations

The constitution or treaty establishing an international organisation indicates the powers that that organisation possesses and the extent to which those powers are to be performed.¹⁷ However, it is not always the case that the constituent document is precise regarding the powers that an organisation possesses or must have. This happens, for example, where the constituent document is silent or ambiguous on jurisdictional aspects.

With specific reference to the SADC Tribunal, the powers that were given to and/or exercised by the SADC Tribunal were mainly conferred on it by member states through the *SADC Treaty* and the Protocol on the Tribunal *and* Rules thereof (*SADC Protocol on the Tribunal*).¹⁸ The SADC Protocol was silent on whether or not the SADC Tribunal had jurisdiction over human rights cases. This therefore requires a detailed discussion of the doctrine of the express and implied powers of international organisations.

2.1 Express powers

Express powers are those powers that are explicitly conferred upon an organisation by state parties. They indicate the nature and the extent to which the powers must be exercised.¹⁹ According to the doctrine of express powers, an organisation may exercise only the powers that are given to it by member states through a constituent document.²⁰ In this regard, the SADC Tribunal's jurisdiction is provided for in article 14 of the *SADC Protocol on the Tribunal*, which indicates that the Tribunal shall have jurisdiction over all disputes that relate *inter alia* to the interpretation and application of the *SADC Treaty*. The proponents of expressed powers argue that the *SADC Tribunal* can do only what its jurisdictional clause mandates it to do, and that

¹⁷ Ebobrah 2008 http://www.escri-net.org/usr_doc/S_Ebobrah.pdf.

¹⁸ Sarooshi 2003 <http://www.jeanmonnetprogram.org/archive/papers/03/030401.pdf>.

¹⁹ *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, 1996 ICJ Reports 226 (8 July 1996) para 25.

²⁰ Ebobrah 2008 http://www.escri-net.org/usr_doc/S_Ebobrah.pdf.

anything outside that would be beyond its mandate.²¹ In light of the failure of the *SADC Protocol on the Tribunal* to refer emphatically to the competency to deal with human rights cases, the question posed by Campbell is relevant: "if an express power is given does the definition of that power mean that you cannot exercise another similar power which is not expressed?"²² The question arises because what is clearly set out in the *SADC Treaty* and the *SADC Protocol on the Tribunal* is the fact that specific reference is made to the "observance of human rights and the rule of law" in the Preamble. Furthermore, the *SADC Treaty* also requires member states to act in accordance with the principles of human rights, democracy and the rule of law.²³ Given this, the question to ask is whether the principles and aspirations that are contained in the *SADC Treaty* impose obligations on member states to respect human rights in their respective territories. Alternatively, does the mere reference to human rights in the *SADC Treaty* empower the SADC Tribunal, through implied powers, to adjudicate over cases of human rights? These are some of the key questions that will be addressed in this discourse.

2.2 Implied powers

Implied powers are those powers which, while not explicitly stated, seem to be implied by the express powers in a constituent document.²⁴ The theory of implied powers was modelled on the constitutional and administrative laws of countries such as the United States and England.²⁵ Following this, it was then accepted as a principle of international law.²⁶ Hartley, Craig and De Búrca state that the doctrine of implied powers can have both a narrow and wide meaning.²⁷ In the narrow sense, "the existence of a power implies also the existence of any other power which is reasonably necessary for the exercise of the former".²⁸ According to the broader meaning, "the existence of a given objective or function implies the existence of any

²¹ Nkhata 2012 *AJICL* 97; Johnson 2011 <http://www.jdsupra.com/legalnews/enforcing-judgments-in-international-law-69044/>.

²² Campbell 1984 *ICLQ* 524.

²³ A 4(c) of the *SADC Treaty*.

²⁴ *McCulloch v Maryland* 17 US 4 Wheat 316 (1819) 316.

²⁵ Hartley *Foundations of European Union Law* 113.

²⁶ Hartley *Foundations of European Union Law* 113.

²⁷ Craig and De Búrca *EU Law* 123; Hartley *Foundations of European Union Law* 113.

²⁸ Craig and De Búrca *EU Law* 123.

power reasonably necessary to attain it".²⁹ Support for the contention that implied powers may legitimately be exercised is based on the fact that the application of another power is for the purposes of complementing an already existing power, function or objective. It can therefore be said that belief in the doctrine of implied powers denotes that the tribunal could exercise certain powers even though such powers are not contained in its founding document.³⁰ Implied powers are deemed to be conferred on the organisation only if they are essential for the performance of explicit powers and functions.³¹ This is an exception to the doctrine of express powers which requires that only those powers that are set forth in the constituent document should be exercised.³² The doctrines of implied and express powers appear to be competing against each other, because the former involves the protection of community interest³³ while the latter seems to be protective of state sovereignty, because it requires the organisation to act within the mandate that was given to it by member states.³⁴ It is submitted that these doctrines should not be seen as being in conflict with each other but as supplementing each other, as implied powers come into play only when express powers do not provide an answer to a particular question.

The resort to the exercise of implied powers by international organisations is not without constraints. The test applied to ascertain whether or not an international organisation has implied powers is whether the exercise of an implied power is necessary for the organisation to achieve its object and purpose as specified in the constituent treaty.³⁵ If the answer is no, then an organisation would have acted beyond its mandate and the exercise of such a power would be *ultra vires*. The paper now discusses the decisions of international tribunals that have involved the exercise of implied powers.

²⁹ Craig and De Búrca *EU Law* 123; Hartley *Foundations of European Union Law* 113.

³⁰ Rama-Montaldo 1970 *BYIL* 114.

³¹ Rama-Montaldo 1970 *BYIL* 114; Ebobrah 2008 http://www.escri-net.org/usr_doc/S_Ebobrah.pdf.

³² Ebobrah 2008 http://www.escri-net.org/usr_doc/S_Ebobrah.pdf.

³³ Klabbers *Introduction to International Law* 6.

³⁴ Klabbers *Introduction to International Law* 6.

³⁵ Akade 1998 *EJIL* 451; Sarooshi 2003 <http://www.jeanmonnetprogram.org/archive/papers/03/030401.pdf>.

2.2.1 *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion*³⁶

In this case, a number of people had died while they were in the service of the United Nations.³⁷ Following their deaths, the General Assembly requested an advisory opinion from the ICJ on whether the United Nations had the capacity to bring an international claim against the responsible government for the people who had died while in the service of the United Nations. This was made with a view to obtaining the reparations due in respect of the damage caused to the victims, or the persons entitled to such reparation through the victim.³⁸ The court first indicated that the *Charter of the United Nations (UN Charter)* "does not expressly confer upon the Organisation the capacity to include, in its claim for reparation, damage caused to the victim or to persons entitled through him".³⁹ It then asked whether or not:

... the provisions of the Charter concerning the functions of the Organisation, and the part played by its agents in the performance of those functions, imply for the Organisation power to afford its agents the limited protection that would consist in the bringing of a claim on their behalf for reparation for damage suffered in such circumstances.⁴⁰

The court answered the aforesaid question in the affirmative. It said that under international law, an organisation must be construed as being given implied powers which are necessary for discharging its duties even if such powers are not expressly provided for in the constituent document.⁴¹ Since taking this decision the ICJ has applied the doctrine of implied powers in other cases.⁴² Other courts from other

³⁶ *Reparation for Injuries Suffered in the Service of the United Nations* Advisory Opinion, 1949 ICJ Reports 174 (11 April 1949) 174 (hereinafter referred to as the *Reparations* case).

³⁷ *Reparations* case 175.

³⁸ *Reparations* case 175.

³⁹ *Reparations* case 182.

⁴⁰ *Reparation* case 182. Also see *Reparations* case 180, where the court said "... the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice".

⁴¹ *Reparation* case 182.

⁴² See for example *Certain Expenses of the United Nations (Article 17 para 2 of the Charter)* Advisory Opinion, 1962 ICJ Reports 151 (20 July 1962) 159 (hereinafter referred to as *Certain Expenses of the United Nations* case); *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, 1996 ICJ Reports 226 (8 July 1996) 226; *Competence of the International Labour Organisation to Regulate, Incidentally, the Personal Work of the Employer* Advisory Opinion, IPCJ Series B - No 13 (23 July 1926) 18.

jurisdictions have also invoked implied powers, where there are no express powers from the constituent document.⁴³

2.2.2 *Certain Expenses of the United Nations case*

The measures undertaken by the United Nations in the 1960s for peace-keeping operation purposes in the Congo and the United Nations Emergency Force in the Middle East resulted in huge expenditure.⁴⁴ This caused some members of the United Nations to object in that they were not bound by the operations in the Congo, amongst others, as the operation had not been undertaken in line with the provisions of the *UN Charter*.⁴⁵ To this effect, they argued that members of the United Nations should not be bound by such obligations.⁴⁶ The General Assembly then requested an advisory opinion from the ICJ on whether certain expenditures which had been authorised by the General Assembly to cover the costs of the United Nations operations in the Congo and the Middle East constituted expenses of the Organisation within the meaning of article 17(2) of the *UN Charter*.⁴⁷ The ICJ responded *inter alia* by stating that

... when the Organisation takes action which warrants the assertion that it was appropriate for the fulfilment of one of the objectives of the United Nations, the presumption is that such action is not *ultra vires* the Organization.⁴⁸

The ICJ took the flexible approach that the United Nations' General Assembly did indeed possess implied powers. As in the *Reparations* case, the court again demonstrated its ability to utilise its interpretative powers by not restricting itself to what was contained in a specific clause of the constituent document, but by finding that it was necessary to imply that the Organisation had the additional powers

⁴³ See for example *Commission of the European Communities v Council of the European Communities - European Agreement on Road Transport* Case 22-70 (31 March 1971) para 16; Wouters and De Man 2009 https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp21-30/wp21.pdf; Sarooshi 2003 <http://centers.law.nyu.edu/jeanmonnet/archive/papers/03/030401.pdf>; Rama-Montaldo 1970 *BYIL* 124.

⁴⁴ Hogg 1962 *Colum L Rev* 1231.

⁴⁵ Hogg 1962 *Colum L Rev* 1231-1232.

⁴⁶ Hogg 1962 *Colum L Rev* 1232.

⁴⁷ *Certain Expenses of the United Nations case* 152.

⁴⁸ *Certain Expenses of the United Nations case* 168.

necessary in order for it to be able to achieve its object and purposes as provided for in the founding document.⁴⁹

The court's approach is acceptable, and it is argued that it is in line with the provisions of the *Vienna Convention on the Law of Treaties* (*Vienna Convention*). These require that a treaty be interpreted with reference *inter alia* to its objectives and purposes.⁵⁰ In addition, the *Vienna Convention* requires the preamble to any treaty to also be considered during the process of interpretation, so that the document is considered as a whole, in order to avoid interpreting certain provisions in isolation from other parts of the document.⁵¹

This flexible approach is supported, because it provides guidance. It provides direction, in that the powers of an organisation that can be shown to be necessary for the fulfilment of the organisation's objectives and purposes are deemed to be within the competence of that body.⁵² This is on condition that such powers are not expressly excluded.⁵³

2.2.3 *Prosecutor v Duško Tadić*⁵⁴

After the serious violation of international humanitarian law during the 1990s in the territory of the former Yugoslavia, the United Nations Security Council (Security Council), acting pursuant to Chapter VII of the *UN Charter*, established the ICTY to prosecute the accused.⁵⁵ In creating the ICTY the Security Council acted in terms of article 39 of the *UN Charter*, which had given it powers to determine *inter alia* the existence of a threat to peace or a breach of the peace and to decide what measures to take in order to restore peace in accordance with articles 41 or 42 of the *UN Charter*. The Security Council in this instance opted to create the ICTY under article 41 of the *UN Charter*, which is a measure that does not involve the use of

⁴⁹ Akade 1998 *EJIL* 446.

⁵⁰ Aa 31(1) and (2), and 31(3)(c) of the *Vienna Convention on the Law of Treaties* 1155 UNTS 331, 8 ILM 679 (1969).

⁵¹ Fitzmaurice 1957 *BYIL* 208-209; Rogoff 1996 *Am U J Int'l L & Pol'y* 590.

⁵² Akade 1998 *EJIL* 446.

⁵³ Akade 1998 *EJIL* 446.

⁵⁴ *Prosecutor v Dusko Tadic aka "Dule" (Decision on the Defence Motion on Jurisdiction)* IT-94-1 (10 August 1995) (hereinafter referred to as the *Dusko Tadic* case).

⁵⁵ *Dusko Tadic* case para 19.

armed force. Under article 41 of the *UN Charter*, measures that exclude the use of armed force are those that:

... [M]ay include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

The accused filed a preliminary motion challenging the jurisdiction of the tribunal on the basis that it lacked the power and the competency to try him.⁵⁶ The accused argued that the actions of the Security Council in creating the ICTY and its statute were beyond its (the Security Council's) powers under articles 41 of the *UN Charter*.⁵⁷ Further, the accused *inter alia* argued that the establishment of the ICTY had not been envisaged under article 41 of the *UN Charter* because the examples contained therein did not include judicial measures, consisting solely of economic and political sanctions.⁵⁸ The ICTY said that article 41 of the *UN Charter* on its face "does not limit the discretion of the [Security Council] to take measures not involving the use of armed force".⁵⁹ In addition, the ICTY held that Chapter VII of the *UN Charter* confers "very wide powers" upon the Security Council and that there was no good reason advanced as to why article 41 should be read as excluding the establishment of the ICTY to punish those responsible for atrocities in the former Yugoslavia.⁶⁰ The court therefore dismissed the accused's preliminary motion that challenged the jurisdiction of the ICTY. The approach adopted by the court in this matter is commendable as it adopted a flexible approach in interpreting article 41 of the *UN Charter* to also include powers of the Security Council to create a tribunal. Indeed, the measures listed under article 41 of the *UN Charter* do not constitute a closed list, as the words "may include" imply that other measures that are not listed in the provision may also be explored. It is submitted that had the ICTY adopted a rigid approach in interpreting the provisions of the *UN Charter*, this would have denied the Security Council an opportunity to deal with something that was well within its powers – namely, to restore peace.

⁵⁶ *Dusko Tadic* case para 1.

⁵⁷ *Dusko Tadic* case para 1.

⁵⁸ *Dusko Tadic* case para 28.

⁵⁹ *Dusko Tadic* case para 26.

⁶⁰ *Dusko Tadic* case para 27.

In light of the above exposition, it is evident that international tribunals have not been hesitant to invoke and apply the doctrine of implied powers in order to give an organization the power necessary to achieve its objectives and purposes as contained in its constituent document.

3 Jurisdiction of sub-regional courts over human rights in Africa

The ECOWAS CCJ, the EACJ and the SADC Tribunal have also been confronted with cases that required the exercise of implied powers. This is because the constituent documents of the aforesaid organisations were silent or not clear with regard to the ability of the tribunals to adjudicate over cases involving allegations of human rights violations. This part deals with the manner in which each tribunal exercised jurisdiction over human rights when the founding treaty was not clear or silent on the competency of the tribunal in that regard.

3.1 The East African Court of Justice

The EACJ is the judicial organ of the EAC.⁶¹ It was created in 1999, and became operational in 2001. The jurisdiction of the court is governed by article 27(1) of the *Treaty Establishing the Community*, which gives it competency to interpret and apply the provisions of the said Treaty. Other powers such as that of adjudicating over human rights cases, will be determined in future by the Council.⁶² Pending the aforesaid determination, the EACJ does not have jurisdiction over issues relating to the violation of human rights.⁶³ Despite this, it is submitted that there exists an implied mandate in the *Treaty Establishing the East African Community* which empowers the EACJ to receive and adjudicate over cases concerning allegations of human rights abuse. This proposition is supported by the court's decision in the matter between *Katabazi v Secretary General of the East African Community*.⁶⁴ The applicants in this case had *inter alia* been charged with treason. They had therefore

⁶¹ See a 9 of the *Treaty Establishing the East African Community* (1999).

⁶² A 9 of the *Treaty Establishing the East African Community* (1999).

⁶³ In 2005, a draft protocol was created that was intended to expand the jurisdiction of the court to cater for human rights cases, but to date nothing has been finalised. See Mwinuka *Regional Human Right Systems* 7.

⁶⁴ *Katabazi v Secretary General of the East African Community* (Ref No 1 of 2007) 2007 EACJ 3 (1 November 2007) (hereinafter referred to as the *Katabazi* case). See also *Nyong'o v Attorney General of Kenya* (EACJ) unreported case number 1/2006.

been arrested and remanded in custody.⁶⁵ The High Court of Uganda had subsequently granted bail to some of the accused. Soon after their release, the court had been surrounded by security personnel who re-arrested the accused. The applicants had then been prosecuted before a military court for similar charges.⁶⁶ They had been remanded in prison. The Uganda Law Society had approached the Constitutional Court of Uganda and challenged the constitutionality of the prosecution.⁶⁷ The Constitutional Court had declared the detentions unconstitutional and had ordered that the accused persons be released. The Government of Uganda had failed to honour the court order, and the matter was brought before the EACJ.⁶⁸

In the EACJ, the applicants argued that the military charges, continued detention, and failure to observe a court order violated articles 6(d), 7(2) and 8(1)(c) of the *Treaty Establishing the East African Community*, amongst others.⁶⁹ Article 6(d) of the *Treaty Establishing the East African Community* provides that the fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States includes adherence to the principles of democracy, the rule of law, and the recognition, promotion and protection of human rights as contained in the *African Charter on Human and Peoples' Rights*. Under article 7(2) of the *Treaty Establishing the East African Community*, Partner States undertook to "abide by the principles of good governance, including adherence to the principles of democracy, the rule of law ... and universally accepted standards of human rights". Article 8(1)(c) of the *Treaty Establishing the East African Community* requires partner states to "abstain from any measures likely to jeopardize the achievement of those objectives or implementation of the provisions of the Treaty". The Attorney General of the Republic of Uganda challenged the court's jurisdiction to deal with human rights.⁷⁰ The basis for this was that the Council had not yet adopted the protocol that would have extended the court's power to adjudicate over human rights

⁶⁵ *Katabazi* case 1.

⁶⁶ *Katabazi* case 2.

⁶⁷ *Katabazi* case 2.

⁶⁸ *Katabazi* case 2.

⁶⁹ The *Katabazi* case, in particular. The applicants *inter alia* sought the following order declaring that the conduct of the members of the Ugandan Armed Forces who surrounded the High Court amounted to an infringement of the Fundamental Principles of the Community in particular regard to peaceful settlement of disputes.

⁷⁰ *Katabazi* case 12.

cases.⁷¹ The court agreed with Counsel to the effect that it had no jurisdiction over human rights cases as there was no protocol that has been adopted to operationalise its human rights mandate.⁷² It nonetheless said that:

[w]hile the court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegation of human rights violation.⁷³

Therefore, the EACJ assumed jurisdiction and concluded that the intervention by the armed security agents of Uganda to prevent the execution of a court order violated the principle of the rule of law and the *Treaty Establishing the East African Community*. Furthermore, the court asserted that to uphold Uganda's defence that the re-arrest of the accused persons was necessary for security reason would leave a "dangerous precedent, which would undermine the rule of law".⁷⁴ Despite a clear absence of jurisdiction⁷⁵ over human rights, the court opted to extend its powers through assuming implied powers to adjudicate over a human rights case by way of considering the overall objectives and purposes of the Treaty.⁷⁶ This decision is commendable. It shows the ability of the court to interpret the provisions of a treaty in a manner that does not run counter to the promotion and protection of human rights. However, it would appear that this decision has received mixed reactions from various quarters. Some argue that the court lacks jurisdiction over human rights.⁷⁷ Others are of the view that it is not clear whether the court may exercise jurisdiction over human rights matters.⁷⁸ There are also those who say that it did not have express jurisdiction over human rights,⁷⁹ whereas others are of the view that it does not yet have human rights jurisdiction.⁸⁰ The aforesaid views demonstrate that there are some authors who subscribe to the orthodox approach of treaty

⁷¹ *Katabazi* case 12-14.

⁷² *Katabazi* case 14-15.

⁷³ *Katabazi* case 16.

⁷⁴ *Katabazi* case 22.

⁷⁵ Murungi and Gallinetti 2010 *SUR - Int'l J Hum Rts* 133; Viljoen *International Human Rights Law* 504.

⁷⁶ *Katabazi* case 15-16. See also Gathii 2012 *ORIL* 262; Viljoen *International Human Law Rights* 504.

⁷⁷ Ruppel "Regional Economic Communities" 291.

⁷⁸ Viljoen *International Human Rights Law* 504.

⁷⁹ Ebobrah 2011 *AHRLJ* 224.

⁸⁰ Bbosa "Critique of the East African Court of Justice" 283; Ebobrah 2009 *AHRLJ* 315; Ojienda 2008 *EAJHRD* 98.

interpretation. This view relies on the fact that only what is contained in the treaty may be looked at. The author does not support this approach, as it would restrict an organization from fulfilling its mandate. Various provisions, as indicated above, in the *Treaty Establishing the East African Community* require/oblige Member States to respect human rights, observe the rule of law and democracy. It is submitted that it is inconceivable that the objectives of the EAC can be achieved when fundamental principles such as the rule of law, democracy and human rights are undermined. Furthermore, under international law the word "principle" refers to binding obligations.⁸¹ Accordingly, it is submitted that the EACJ acted within its powers when it invoked implied powers which are necessary for the organisation to fulfil its mandate. There is thus the existence of an implied mandate in the *Treaty Establishing the East African Community* that allows the EACJ to deal with human rights cases. This is supported by extensive reference to human rights in the Treaty which is written in mandatory terms, including the obligation on Member States to undertake to respect human rights.

3.2 The SADC Tribunal

The jurisdiction of the SADC Tribunal involves the interpretation and application of the *SADC Treaty*, including its protocols and subsidiary instruments, which applies within the SADC.⁸² It can be noted from the description of the scope of its jurisdiction that the *SADC Treaty* and the *SADC Protocol on the Tribunal* are silent on whether the SADC Tribunal can receive and adjudicate cases of human rights violations. Despite the absence of express jurisdiction on human rights in these instruments, the *SADC Treaty* does make reference to human rights and other fundamental principles such as democracy and the rule of law that a civilised nation ought to observe.⁸³ Whether this reference to human rights does in fact constitute granting jurisdiction over human rights is what the SADC Tribunal dealt with in the matter of *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe*.⁸⁴ This case involved

⁸¹ Bartles 2011 <http://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and-Terms-of-Reference-of-the-SADC-Tribunal-Final-Report>.

⁸² A 16(1) of the *SADC Treaty*, a 14 of the *SADC Protocol on the Tribunal*.

⁸³ Preamble to the *SADC Treaty* and a 4(c), which requires member states to act in accordance with the principles of human rights, democracy and the rule of law.

⁸⁴ *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe* 2008 SADCT 2 (28 November 2008).

Zimbabwe's controversial land reform policy. The applicants challenged Zimbabwe's policy that authorised the expropriation of their farms without compensation. In advancing their case, the applicants contended that the acquisition of land without compensation breached the government of Zimbabwe's obligations under the *SADC Treaty* to act in accordance with the principles of human rights, democracy, and the rule of law, amongst others. The respondent argued that the SADC Tribunal had no jurisdiction to adjudicate over human rights cases under the *SADC Treaty* because the Treaty "only sets out the principles and objectives of SADC" not the "standards against which actions of Member States can be assessed".⁸⁵ The respondent further contended that that the SADC Tribunal may not borrow the aforesaid standards from other instruments as doing so would be tantamount to legislating on behalf of states.⁸⁶ The respondent also argued that there is no protocol dealing with human rights or land reform that would give effect to the principles set forth in the *SADC Treaty*.⁸⁷ Lastly, the respondent argued that the SADC Tribunal may interpret only what has already been agreed upon by member states, and therefore, in the absence of any set standards that would hold member states accountable, the Tribunal appeared to have no jurisdiction to deal with the land reform policy.⁸⁸

The SADC Tribunal held that under article 21(b) of the *SADC Protocol on the Tribunal* it had the power to develop its jurisprudence through the use *inter alia* of applicable treaties and rules of public international law. As a result, it could consult other sources for answers when the *SADC Treaty* did not provide any.⁸⁹ It further did not consider it necessary for it to have an additional protocol on human rights that would give effect to the principles of the *SADC Treaty*.⁹⁰ It therefore relied on principle 4(c) of the *SADC Treaty* which obliges Member States to act in accordance with the principles of human rights, democracy and the rule of law when it adjudicated over a case involving human rights violations.⁹¹ Accordingly, the SADC Tribunal indicated that the aforesaid provision empowered it to deal with any human

⁸⁵ *Campbell* case 23.

⁸⁶ *Campbell* case 23.

⁸⁷ *Campbell* case 23.

⁸⁸ *Campbell* case 24.

⁸⁹ *Campbell* case 24.

⁹⁰ *Campbell* case 24.

⁹¹ *Campbell* case 24-25.

rights dispute.⁹² It was apparent that the *SADC Treaty*, read together the *SADC Protocol on the Tribunal*, the Preamble to the *SADC Treaty* and the description of the objectives and the principles of the *SADC Treaty* had clearly established the basis for its human rights jurisdiction.⁹³

While the Tribunal's ruling has been the subject of much commentary from scholars of international law, who have lauded the progressive decision rendered by the SADC Tribunal, the decision has nonetheless also been strongly criticised by certain SADC governments.⁹⁴ It is submitted that the aforesaid decision against Zimbabwe eventually resulted in the demise of the SADC Tribunal. The rationale for this submission is that the judgement was simply ignored by the government of Zimbabwe, even though the SADC Tribunal had submitted several complaints to the Summit about Zimbabwe's non-compliance.⁹⁵ The Summit also did nothing to ensure that Zimbabwe complied with the SADC Tribunal's decision. There was more to this storm. It is said that Zimbabwe brought a "politico-legal challenge" via a report to the Summit questioning the existence, and functioning (including seeking a review of the *SADC Treaty* and the *SADC Protocol on the Tribunal*) of the SADC Tribunal.⁹⁶ This was followed by the Summit's decision of August 2010 which ordered the suspension of the SADC Tribunal whilst the review of its functions and terms of reference were underway.⁹⁷ The findings of the review that were prepared by an independent consultant found that the SADC Tribunal was properly constituted

⁹² *Campbell* case 25.

⁹³ Cowel 2013 *HRLR* 5.

⁹⁴ For example, President Mugabe has referred to the decisions of the SADC Tribunal as nonsense and of no force and effect. Referring to the SADC Tribunal, President Iakaya Kikwete is reportedly to have said "We have created a monster that will devour us all" to fellow SADC leaders. See Karlsson *et al* "International Human Rights" 9.

⁹⁵ See for example *Louis Karel Fick v The Republic of Zimbabwe* 2010 SADCT 8 (16 July 2010) wherein the applicants approached the SADC Tribunal for a declaratory order indicating that the respondent had failed to comply with decisions of the SADC. The domestic court of the respondent had refused to register and enforce the decision of the Tribunal. In addition, the respondent had sent a letter to the SADC Tribunal informing it that it would not subject itself to the court's jurisdiction and that all the previous decisions made by the SADC Tribunal against Zimbabwe were null and void. On this basis the Court established a breach of compliance. The SADC Tribunal found that the respondent had failed to comply with its decisions and made a decision to report the respondent to the Summit.

⁹⁶ Ebobrah 2009 *AJICL* 101.

⁹⁷ SADC Heads of State 2010 http://www.sadc.int/files/3613/5341/5517/SADC_Jubilee_Summit_Communique.pdf.pdf.

under international law and therefore its decisions should be binding on Zimbabwe.⁹⁸ Importantly, the findings by an independent consultant also recommended that the SADC Tribunal should be allowed to function.⁹⁹ The recommendations were ignored. Instead, the Summit mandated the Council of Ministers to review the role and responsibilities of the suspended SADC Tribunal and its jurisdiction.¹⁰⁰ The Council of Ministers, in their efforts to produce a report as per the Summit's mandate, met with various stakeholders such as human rights activists who were campaigning against the suspension of the SADC Tribunal.¹⁰¹ The lobby group's efforts produced positive results as most of their recommendations (such as individual access and jurisdiction over human rights) were received well by Council Ministers.¹⁰² However, the Council of Ministers acknowledged that this was no longer a legal issue but a political one.¹⁰³ It is said that President Mugabe was also in contact with other Heads of States canvassing against the SADC Tribunal on the basis that the decisions of the Tribunal were also going to have impact in their territories if it were to be allowed to continue working.¹⁰⁴ The Council of Ministers' report to the Summit retained a provision affording the rights of individuals to have access to the SADC Tribunal but recommended that its human rights jurisdiction to be put on hold pending the adoption of a separate human rights protocol.¹⁰⁵ The Summit rejected the said proposals and instead decided to limit the jurisdiction of the SADC Tribunal to disputes between member states.¹⁰⁶ It is in this regard that it has been said that the Summit suspended the SADC Tribunal because it had ruled against one of their own.¹⁰⁷ But one may ask why the Summit reached a consensus (as if in support of Zimbabwe) in a process that halted an institution that was meant to uphold the rule

⁹⁸ Bartles 2011 <http://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and-Terms-of-Reference-of-the-SADC-Tribunal-Final-Report>.

⁹⁹ Bartles 2011 <http://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and-Terms-of-Reference-of-the-SADC-Tribunal-Final-Report>.

¹⁰⁰ SADC Heads of State and Government 2011 <http://www.swradioafrica.com/Documents/SADCSummit240511.pdf>.

¹⁰¹ Hulse and Van der Vleuten "Agent Run Amuck" 96.

¹⁰² Hulse and Van der Vleuten "Agent Run Amuck" 96.

¹⁰³ Hulse and Van der Vleuten "Agent Run Amuck" 96.

¹⁰⁴ De Wet 2013 *ICSID Review* 1; Hulse and Van der Vleuten "Agent Run Amuck" 96.

¹⁰⁵ Hulse and Van der Vleuten "Agent Run Amuck" 96.

¹⁰⁶ SADC Heads of State and Government 2012 http://www.sadc.int/files/3413/4531/9049/Final_32nd_Summit_Communique_as_at_August_18_2012.pdf.

¹⁰⁷ Erasmus 2014 <http://www.tralac.org/images/docs/5553/s14tb032014-erasmus-high-court-of-botswana-steps-into-void-sadc-tribunal-20140305-fin.pdf>.

of law in the SADC region? The SADC Tribunal was perhaps unfortunate to have been confronted with a first case that involved the redistribution of land. Post colonialism and because of the dispossession of land from Africans, the issue of land reform in countries such as South Africa,¹⁰⁸ Zimbabwe¹⁰⁹ and Namibia¹¹⁰ remains at the top of the political agenda. As a result, measures to address land reform in the aforesaid countries began a while ago. Accordingly, if the Campbell decision had been enforced in Zimbabwe, its effects would presumably have been felt beyond the borders of Zimbabwe, where land reform was actually taking place. There would also be huge administrative and practical consequences because of the progress made regarding the redistribution of land. To this end, the High Court of Zimbabwe in *Gramara (Private) Limited v Government of the Republic of Zimbabwe*¹¹¹ said:

[SADC Tribunal's decision] ramifications extend to the former owners of all the agricultural land that has been acquired by the Government since 2000 in terms of section 16B of the Constitution. In effect, enforcement of the decision [...] and compliance with it generally would ultimately necessitate the Government having to reverse all the land acquisitions that have taken place since 2000. Apart from the political enormity of any such exercise, it would entail the eviction, upheaval and eventual relocation of many if not most of the beneficiaries of the land reform programme.

In the light of this, the author is of the view that because of the current programmes that are designed to address identical colonial injustices in the aforesaid countries, SADC members showed solidarity and therefore supported Zimbabwe. Further, other countries such as Angola, Swaziland and the Democratic Republic of Congo had an interest in the demise of the SADC Tribunal because of the poor human rights record in their territories.¹¹² The Bushmen in Botswana and the gay people in Malawi would also have probably taken their governments to the SADC Tribunal on the bases of allegations of human rights abuse. Therefore, they did not wish to be held accountable by the SADC Tribunal, which was located outside their countries and far from their political influence.¹¹³ Finally, it could also be argued that Lesotho voted in

¹⁰⁸ See, for example, the South African *Restitution of Land Rights Act* 22 of 1994.

¹⁰⁹ See, for example, *Constitution of Zimbabwe Amendment (No 16) Act*, 2000.

¹¹⁰ See, for example, the Namibian *Agricultural (Commercial) Land Reform Act* 6 of 1995.

¹¹¹ *Gramara (Private) Limited v Government of the Republic of Zimbabwe* HC 33/09 (26 January 2010) 29.

¹¹² Hulse and Van der Vleuten "Agent Run Amuck" 96.

¹¹³ Hulse and Van der Vleuten "Agent Run Amuck" 96.

support of the Summit decision because it was facing a commercial case that would have had potentially far reaching cost implications against the country.¹¹⁴

In the light of the above exposition, it is pertinent to state that solidarity triumphed over the rule of law, as the Campbell decision and other factors ultimately resulted in the suspension of the SADC Tribunal, which was viewed as having exceeded its mandate or as a threat to state sovereignty.¹¹⁵

Zenda,¹¹⁶ for example, is also concerned about what he refers to as the "casual reference" by the SADC Tribunal to concepts such as democracy, the rule of law and human rights, because there are no precise meanings of the aforesaid terms. According to him the word "democracy" is a broad political concept that was ill-suited to be brought before the SADC Tribunal.¹¹⁷ As for the concept of "human rights", he states that it is not clear about which rights are referred to, because some states are more concerned with economic rights than social and cultural rights.¹¹⁸ He is of the view that the SADC Tribunal was incorrect to rely on article 4(c) of the *SADC Treaty* as the basis for its human rights jurisdiction, because article 14 of the *SADC Protocol on the Tribunal* already sets out the jurisdiction of the Tribunal.¹¹⁹ Zenda's observation deserves scrutiny. Firstly, the concepts of the rule of law, democracy and human rights are interdependent and interconnected.¹²⁰ In other words, one cannot talk about a democratic state if that egalitarian state disregards fundamental principles such as human rights and the rule of law, which are expected to prevail in such a state. Once the state is regarded as democratic, it is submitted that there must be respect for the rule of law and human rights. It is conceded that the term "rule of law" is wide in the scope of its application, but it

¹¹⁴ *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho* 2010 SADCT 4 (11 June 2010).

¹¹⁵ Hulse 2012 <http://www.e-ir.info/2012/10/25/silencing-a-supranational-court-the-rise-and-fall-of-the-sadc-tribunal/>.

¹¹⁶ Zenda *SADC Tribunal* 41.

¹¹⁷ Zenda *SADC Tribunal* 41.

¹¹⁸ Zenda *SADC Tribunal* 105.

¹¹⁹ Zenda *SADC Tribunal* 105.

¹²⁰ Bingham 2007 *CLJ* 75. Also see the *African Commission on Human and Peoples' Rights Resolution on the Establishment of a Committee on the Protection of the Rights of People Living with HIV, and Those at Risk, Vulnerable to and Affected by AIDS* ACHPR/Res 163(XLVII) (2010), where it states that where the rule of law and human rights are not respected, those who are most vulnerable suffer.

¹²⁰ Bingham 2007 *CLJ* 75-77.

includes the observance of democratic principles such as human rights.¹²¹ As for the term "human rights" in respect of which he remarks that there is insufficient precision as to which rights are to be protected, this observation is untenable. Human rights include civil, economic, political and social and cultural rights. All of these rights require protection, and no rights should be regarded as being more demanding or important than other rights.¹²² In the light of the above exposition, I am unable to agree with Zenda's attacks on the reasoning of the SADC Tribunal. It is therefore submitted that it was within the SADC Tribunal's power to grant itself the competency to deal with human rights cases by interpreting article 4(c) of the *SADC Treaty* as obliging Member States to act in accordance with the principles of human rights, democracy and the rule of law.

There is a possibility that the omission of the express mandate over human rights was a diplomatic omission. This conjecture is supported by the fact that there were unsuccessful attempts to grant the SADC Tribunal express mandate over human rights in 1997.¹²³ Some authors are of the view that the said proposals were not a huge concern at the time, as the *SADC Treaty* already made reference to human rights,¹²⁴ and to this end human rights already fell within the SADC Tribunal's mandate through implication.¹²⁵ Indeed, it is unthinkable that SADC Member States would be able to realise the principles that are set out in the *SADC Treaty*, such as acting in accordance with the principles of human rights and the rule of law, and the duty to refrain from taking any measures that are likely to compromise the accomplishment of the said standards, if those principles were ignored.¹²⁶

Other authors are of the view that even though RECs were created mainly to deal with economic issues as opposed to the protection of human rights, there is a link between the motives for their objectives of regional integration, such as improving the welfare of the people, and the realisation of socio-economic rights.¹²⁷ Nkatha

¹²¹ Bingham 2007 *CLJ* 75-77.

¹²² Nickel 2008 *Hum Rts Q* 988.

¹²³ Ebobrah *Legitimacy and Feasibility of Human Rights Realization* 309.

¹²⁴ Ruppel "Regional Economic Communities" 291.

¹²⁵ Ruppel "Regional Economic Communities" 292.

¹²⁶ See aa 6(1) and 5(c) of the *SADC Treaty*.

¹²⁷ Viljoen *International Human Rights Law* 488, 495-496.

takes a different stand and argues that the SADC Tribunal avoided a precise and deliberate discussion of whether and how it had the power to deal with human rights.¹²⁸ He is of the view that the reasoning of the SADC Tribunal is not convincing if one adopts an orthodox interpretation of the *SADC Treaty*.¹²⁹ Nkatha's views unfortunately fail to expand on how the SADC Tribunal justified its reasoning. It is submitted that the SADC Tribunal, through implication, relied on the principles set out in the *SADC Treaty*, such as an undertaking to act in accordance with the principles of human rights, democracy and the rule of law, to assume jurisdiction over human rights. The doctrine of implied powers is well known under international law as developed further by the ICJ and adopted by other courts such as the ICTY.

To provide clarity surrounding the Tribunal's human rights jurisdiction, the SADC Summit appointed a consultant to study the human rights jurisdiction of the SADC Tribunal, amongst other factors, and to provide answers.¹³⁰ The study revealed that under international law, principles refer to binding obligations.¹³¹ Bartles further highlighted the fact that "[t]he verbal phrase *shall act* in article 4(c) of the SADC Treaty is in the usual language of obligations, and the object of the sentence *in accordance with the following principles ...*' is clearly defined".¹³² As a result, these constitute binding obligations and therefore the SADC Tribunal was well vested to deal with human rights.¹³³ The consultant therefore found that the SADC Tribunal correctly dealt with a human rights case and found no basis for the suspension of the Tribunal. The aforesaid recommendations were unfortunately ignored by the SADC Summit. This is a major concern and a blow to the SADC region as the SADC Tribunal was the only court at a sub-regional level to deal with human rights cases.

¹²⁸ Nkatha 2012 *AJICL* 97.

¹²⁹ Nkatha 2012 *AJICL* 97.

¹³⁰ Bartles 2011 <http://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and-Terms-of-Reference-of-the-SADC-Tribunal-Final-Report>.

¹³¹ Bartles 2011 <http://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and-Terms-of-Reference-of-the-SADC-Tribunal-Final-Report>. See also *P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* Joined Cases C-402/05 P and C-415/05.

¹³² Bartles 2011 <http://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and-Terms-of-Reference-of-the-SADC-Tribunal-Final-Report>. Emphasis added.

¹³³ Bartles 2011 <http://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and-Terms-of-Reference-of-the-SADC-Tribunal-Final-Report>.

3.3 ECOWAS CCJ

The *Revised Treaty of the Community of West African States* made provision for the establishment of the ECOWAS CCJ.¹³⁴ The ECOWAS CCJ was subsequently created by Protocol A/P.1/7/91 and it became operational in 2005. The ECOWAS CCJ was initially created to deal with disputes between Member States or between Member States and institutions of ECOWAS.¹³⁵ Member States also have an option to bring cases before the ECOWAS CCJ on behalf of their nationals regarding the interpretation and application of the provisions of the Treaty.¹³⁶ It is therefore apparent that the protection of individuals' rights is dependent on the mercy of states; something that is unlikely to happen because states are generally reluctant to litigate against each other. The *Afolabi Olajide v Federal Republic of Nigeria* case,¹³⁷ which involved an allegation of human rights violations, came before the Court. A Nigerian businessman instituted action against the government of Nigeria about the closure by Nigeria of its common border with Benin. He argued that the closure of the border negatively affected his business, and that it was in violation of the principle of the free movement of persons and goods as contained in the *Revised Treaty of Community of West African States* and the *African Charter on Human and Peoples' Rights*. He contended that he had suffered financial damages. The defendant objected to the jurisdiction of the ECOWAS CJJ to adjudicate on an individual case involving a violation of human rights. The Court ruled that under Protocol A/P1/7/91 only Member States could bring cases before it and dismissed the application. This decision has been regarded as a blow to the protection of human rights.¹³⁸ However, in 2009 the ECOWAS CCJ made a dramatic and ground-breaking decision, declaring that all Nigerians are entitled to education as a legal and human right, thus concretising the fact that the ECOWAS CCJ is committed to

¹³⁴ Aa 6(1)(e) and 15(1) of the *Revised Treaty of the Economic Community of West African States* (1993). It must be noted that the Original Treaty of Community of West African States didn't make any reference to human rights. It is only the Revised Treaty of Community of West African States that makes provision for the "recognition, promotion and protection of human and peoples' rights".

¹³⁵ See a 76(2) of *ECOWAS Community Court of Justice* Protocol A/P.1/7/91 (1991).

¹³⁶ A 9 of *ECOWAS Community Court of Justice* Protocol A/P.1/7/91 (1991).

¹³⁷ *Olajide Afolabi v Fed Rep of Nigeria* ECW/CCJ/APP/01/03.

¹³⁸ Viljoen *International Human Rights Law* 507.

bringing human rights cases within its jurisdiction and is not afraid to declare violations of the same.¹³⁹

It is submitted that the ECOWAS CCJ adopted a narrow interpretation of the instruments establishing the ECOWAS CCJ by relying on the doctrine of express powers. Article 4(c) of the *Revised Treaty of Community of West African States* *inter alia* provides for the "recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights". Therefore, it is submitted, by implication the aforesaid provision empowers the ECOWAS CCJ to adjudicate over human rights matters, and recently it has not hesitated to do so.

4 What have the ICJ, SADC Tribunal, ECOWAS CCJ, ICTY and the EACJ taught us on implied powers

International courts such as the ICJ have laid down a foundation of practice supporting the contention that implied powers should be exercised as long as they are necessary for the fulfilment of the organisations' objectives. Furthermore, they should be exercised if there is nothing prohibiting their use in the constituent document. Even though the exercise of implied powers was developed by domestic courts, they have received support from other major international tribunals such as the ICTY, which also resorted to the doctrine of implied powers in the *Tadić* case. Sub-regional courts such as the EACJ and the SADC Tribunal also seized the opportunity to exercise implied powers in order to protect and promote human rights. Unfortunately, the ECOWAS CCJ then failed to utilise an opportunity that was well within its implied powers to protect human rights when it opted not to adjudicate over a human rights case. Fortunately, this position no longer prevails as the ECOWAS CCJ has more recently adjudicated cases involving allegations of human rights violations.¹⁴⁰ In the light of the above exposition, it is submitted that the SADC Tribunal acted correctly when it resorted to implied powers to interpret

¹³⁹ *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Education Commission* ECW/CCJ/APP/0808.

¹⁴⁰ *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Education Commission* ECW/CCJ/APP/0808 para 14.

and apply the provisions of the *SADC Treaty* to protect human rights. Further, the discussion of other tribunals has indicated that the courts do resort to implied powers in order to achieve their objectives when their constituent document is silent. It is therefore submitted that implied powers should be used where necessary in order to allow judicial organs to fulfil their mandate. An organisation that exercises implied powers should elaborate on what led it to act in terms of such powers, especially in cases involving the allegation of human rights violations and the interpretation of the treaty that is said to be protecting human rights.

It must nonetheless be conceded that implied powers do not provide the maximum protection of human rights, as litigants have the sympathy of the courts in individual matters only. It is in this regard that Murungi and Gallinetti have expressed the view that even though the exercise of implied powers does not prevent the exercise of jurisdiction, a tribunal could be seen as exceeding the mandate originally given to it, thus inviting parties to challenge its jurisdiction and delay the proceedings.¹⁴¹ This observation has merit, because the decision of the SADC Tribunal in the *Campbell* case was challenged on the basis that the tribunal had no jurisdiction over human rights. However, this should not be an excuse because there may be new factors that may arise in future which were not foreseen or present when the treaty was negotiated and concluded, and it would not be appropriate to refer a treaty back to member states for deliberations and clarity on a particular aspect, as that would presumably deny justice to those whose human rights are under attack.

In the light of the above exposition, it may be concluded that the approach taken by the SADC Tribunal was in line with the provisions of the *Vienna Convention*, which requires *inter alia* that a treaty be interpreted in good faith and that words be given their ordinary meaning with reference to the objectives and purposes of the convention.¹⁴² Further, the *Vienna Convention* requires the preamble of the treaty to be considered during the process of interpretation. In other words, a convention should not be selectively interpreted but it should be read as a whole.¹⁴³ Preambles

¹⁴¹ Murungi and Gallinetti 2010 *SUR - Int'l J Hum Rts* 133.

¹⁴² Aa 31(1) and (2), and 31(3)(c) of the *Vienna Convention on the Law of Treaties* 1155 UNTS 331, 8 ILM 679 (1969).

¹⁴³ Fitzmaurice 1957 *BYIL* 208-209; Rogoff 1996 *Am U J Int'l L & Pol'y* 590.

in international law have several functions such as interpretative and supplementary roles.¹⁴⁴ The motives and aims contained in the preamble can be used to assist the reader to understand and interpret provisions set forth in the operative part of the treaty.¹⁴⁵ The preamble can also *inter alia* "contain supplementary provisions intended to fill the gaps in the treaty by recalling the general principles of law that inspired the treaty".¹⁴⁶ In some instances, the obligations of member states can also be set out in the preamble.¹⁴⁷ It was therefore within the powers of the SADC Tribunal to use the preamble to the *SADC Treaty* to search for answers on whether or not it had competency to adjudicate over human rights cases. The actions of an organisation that can be shown to be necessary for the fulfilment of its objectives and purposes are within the competence of that tribunal, as long as they are not expressly excluded.¹⁴⁸

5 Conclusion and recommendations

The foregoing discussion has revealed that there is seemingly a conflict between the doctrine of express and implied powers. The former requires tribunals not to resort to the application of anything other than what is contained in the constituent document. The latter enables a tribunal to go outside of the express powers as long as doing so would be necessary for the tribunal to fulfil its object and purpose as set out in the founding document. This is, provided that there is nothing prohibiting the exercise of the implied powers. But it is submitted that the doctrines of express and implied powers should not be viewed as competing against each other. Instead, the two should be seen as supplementing each other, because implied powers are resorted to only when express powers are silent (and thus do not prohibit the exercise of a further power). Furthermore, it is submitted that there is no need to

¹⁴⁴ Mbengue 2006 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1456>.

¹⁴⁵ Mbengue 2006 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1456>.

¹⁴⁶ Mbengue 2006 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1456>.

¹⁴⁷ See, for example, *Appellate Body Report, United States: Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755 in which the WTO Appellate Body explained that the preamble informs the interpretation of rights and obligations under WTO Agreements.

¹⁴⁸ Akade 1998 *EJIL* 446.

keep waiting in anticipation for the SADC to adopt a protocol or amend the *SADC Treaty* and/or the *SADC Protocol on the Tribunal* to clarify the Tribunal's human rights jurisdiction.

The SADC Tribunal did not do anything that was prohibited by the *SADC Treaty*. *Inter alia* it utilised the preambles, as an interpretative and supplementary tool to invoke implied powers in order to assert jurisdiction over a human rights case. The doctrine of implied powers is well known under international law and other tribunals have also used it where they deemed it necessary to achieve their objectives and purposes as contained in the constituent document. It is unfortunate that the SADC Tribunal was regarded as having acted beyond its mandate when it resorted to implied powers. It is submitted that the continued suspension of the SADC Tribunal is unwarranted because it did nothing wrong when it invoked implied powers to decide a case that involved allegations of human rights abuse. The seemingly preferred narrow interpretation of the *SADC Treaty* by the SADC Heads of State and Government has destroyed the first attempt to have a supranational court within the SADC region that would have acted as a watch-dog against states that undermines human rights in their territories. Ultimately, it is recommended that the SADC Summit should lift the moratorium on the SADC Tribunal and allow it to function, and that individuals should have access to it.

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LIST OF ABBREVIATIONS

AHRLJ	African Human Rights Law Journal
AJICL	African Journal of International and Comparative Law
AJIL	American Journal of International Law
Am U J Int'l L & Pol'y	American University Journal of International Law and Policy
AU	African Union
BYIL	British Yearbook of International Law
CLJ	Cambridge Law Journal
Colum L Rev	Columbia Law Review
EAC	East African Community
EACJ	East African Court of Justice
EAJHRD	East African Journal of Human Rights and Democracy
ECOWAS	Economic Community of West African States
ECOWAS CCJ	Economic Community of West African States Community Court of Justice
EJIL	European Journal of International Law
HRLR	Human Rights Law Review
Hum Rts Q	Human Rights Quarterly
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICTY	International Criminal Tribunal for the Former Yugoslavia
ORIL	Oregon Review of International Law
RECs	Regional Economic Communities
SADC	Southern African Development Community
SADC Treaty	Treaty of the Southern African Development Community
SADC Tribunal	Southern African Development Community Tribunal

Security Council	United Nations Security Council
Summit	SADC Summit of Heads of States or Government
SUR - Int'l J Hum Rts	SUR – International Journal on Human Rights
U Chi L Rev	University of Chicago Law Review
UN Charter	Charter of the United Nations
Vienna Convention	Vienna Convention on the Law of the Treaties
WTO	World Trade Organisation

NO LONGER IN SUSPENSE: CLARIFYING THE HUMAN RIGHTS JURISDICTION OF THE SADC TRIBUNAL

MR Phooko*

SUMMARY

The Southern African Development Community Tribunal's (SADC Tribunal) decision in the matter of *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe* 2008 SADCT 2 (28 November 2008) demonstrated its ability to utilise the principles contained in the *Treaty of the Southern African Development Community* when it ruled that it had the power and competency to adjudicate over a human rights case. The aforesaid decision was hailed by many scholars as a progressive judgment in the SADC region that would promote the rule of law and ensure that member states respected their treaty obligations in their own territories. Unfortunately, the same judgment resulted in the suspension of the SADC Tribunal in 2010 because it had purportedly acted beyond its mandate when it adjudicated over a case concerning a human rights dispute. This article investigates whether the SADC Tribunal had jurisdiction to deal with cases involving allegations of human rights violations. In addressing this question, this article will discuss the powers (implied and tacit) of international organisations as understood within international law. In addition, the study will ascertain how the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia have dealt with cases that involved disputes concerning a tribunal or an international organisation that was said to have acted beyond its mandate. The study will also make reference to the East African Court of

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Justice and the Economic Community of West African States Court of Justice as they have also dealt with implied powers when they were confronted with cases concerning human rights abuses. Certain decisions of the SADC Summit of Heads of States or Government (Summit) and the Council of Ministers whose roles include the control of functions and/or overseeing the functioning of the SADC will also be referred to in this study.

KEYWORDS: Human Rights; Jurisdiction; SADC Tribunal; International Court of Justice.